Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Promotion of Competitive Networks In Local Telecommunications	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes And Assessments	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

JOINT REGULATORY FLEXIBILITY ACT COMMENTS OF BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS INSTITUTE OF REAL ESTATE MANAGEMENT INTERNATIONAL COUNCIL OF SHOPPING CENTERS MANUFACTURED HOUSING INSTITUTE NATIONAL APARTMENT ASSOCIATION NATIONAL ASSOCIATION OF HOME BUILDERS NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES NATIONAL ASSOCIATION OF REALTORS NATIONAL MULTI-HOUSING COUNCIL AND NATIONAL REALTY COMMITTEE/THE REAL ESTATE ROUND TABLE

(THE "REAL ACCESS ALLIANCE")

I. INTRODUCTION

On behalf of its members, including a substantial number of small entities for purposes of the Regulatory Flexibility Act,[1] the Real Access Alliance ("Alliance")[2] hereby responds to the Commission's invitation for comments on its Initial Regulatory Flexibility Analysis ("IRFA") set forth in the Appendix to the Notice of Proposed Rulemaking ("NPRM") and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 ("IRFA App."). The IRFA is required by the Regulatory Flexibility Act ("RFA"). See 5 U.S.C. § 603.

Among the proposals at issue in these proceedings are proposals of competitive local exchange carriers ("CLECs") and others to force owners and operators of multiple-tenant buildings to give CLECs and other carriers access to the owners' and operators' privately held buildings and to prohibit or limit the use of exclusive dealing arrangements where such rights are given. See IRFA App. at ¶ 3. In considering these and other proposals, the Commission seeks to remove impediments to, and thereby foster, facility-based local telecommunications competition. Id. at ¶ 2. A particular expectation of the Commission is that this proceeding will

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[1] The RFA definition of "small entity" generally includes "small business" as defined by the SBA. See 5 U.S.C. § 601(6). See Appendix to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 at ¶ 5. As a general proposition, SBA defines operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings as small businesses if they generate less than $5,000,000 annually. Id. at ¶ 25.

[2] The members of the Real Access Alliance are as follows: the Building Owners and Managers Association International, the National Association of Real Estate Investment Trusts, the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Multi-Housing Council, and the National Realty Committee.

"further the availability of competition to the many consumers and businesses that are located in multiple tenant environments, such as apartment and office buildings." Id.

In its IRFA, the Commission, pursuant to the requirements of 5 U.S.C. § 603(b), describes "the reasons why action by the agency is being considered;" provides a "statement of the objectives of, and legal basis for, the proposed rules; attempts to identify and "estimate the number of small entities to which the proposed rules will apply;" declares that the NPRM "proposes no additional reporting, recordkeeping or other compliance measures"; and declares that there are no other Federal rules with which the proposed rules would duplicate, overlap or conflict. IRFA App. at ¶ 25.

Not addressed in the IRFA, however, are the requirements of 5 U.S.C. § 603(c). That subsection expressly provides that:

> Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

This subsection goes on to require, giving possible examples, that an agency considering a proposed rule include within its required IRFA a discussion of "significant alternatives" by which small entity economic impact might be minimized. This the Commission has not done. Its IRFA fails to describe any possible alternatives and it obviously could not, therefore, discuss any such alternatives.

II. THE FAILURE TO INCLUDE AN ANALYSIS OF LESS BURDENSOME ALTERNATIVES VIOLATES THE RFA.

The RFA requires agencies to engage in a two-step process designed to assure that careful consideration be given to the manner in which proposed rules impact small entities

economically and the means by which any such impacts can be minimized. Section 603 requires agencies to identify potential economic impacts on small entities, to consider possible ways to minimize those impacts during the formulation of its rulemaking proposal, and to subject its thought process in this respect to public comments. 5 U.S.C. § 603. Section 604 in turn requires the agency to summarize the issues raised by public comments; assess those issues; and state what, if any, changes it has made as a result of those comments. 5 U.S.C. § 604. See also Southern Offshore Fishing Association v. Daley, 995 F.Supp. 1411, 1436 (M.D. Fla. 1998). The obligations imposed by the RFA, moreover, are not merely to consider less severe alternatives, but actually to adopt less severe alternatives where those alternatives will achieve the agency's regulatory goal. North Carolina Fisheries Association, Inc. v. Daley, 27 F.Supp.2d 650, 661 (E.D. Va. 1998).[3] Section 604(a)(5), thus, specifically requires that when it adopts a final rule, an agency must prepare a final regulatory flexibility analysis with:

> a description of the steps [it] has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. (Emphasis supplied.)

5 U.S.C. § 604(a)(5).

Section 603(a), moreover, explicitly requires that an agency's IRFA be made "available for public comment." 5 U.S.C. § 603(a). A material required part of any such initial analysis is

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[3]The agency's general duty, of course, is "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." See Farmers Union v. FERC, 734 F. 2d 1486, 1511 (D.C. Cir. 1984), cert. denied 469 U.S. 1034 (1984). "The failure of an agency to consider obvious alternatives has led uniformly to reversal." Yakima Valley Cablevision v. FCC, 794 F. 2d 737, 746 n. 36 (D.C. Cir. 1986); MVMA v. State Farm Ins. Co., 463 U.S. 29, 49 (1983).

a description and discussion of less burdensome alternatives. 5 U.S.C. § 603(c). The Commission's failure to include any such description or discussion in its IRFA here is thus inadequate notice to the public as a matter of law and a material breach of the procedures required by the RFA. Inadequate notice is a fatal defect to the adoption of a final rule. Cf. Shell Oil Company v. Environmental Protection Agency, 950 F.2d 741, 750-52 (D.C. Cir. 1990). See generally Southern Offshore Fishing Association, supra, 995 F.Supp. at 1436.

The Commission must therefore withdraw its pending NPRM and reissue it with a revised IRFA that includes the required analysis of less burdensome alternatives to its proposed rules.

III. THE REVISED IRFA SHOULD RECOGNIZE THE INAPPROPRIATENESS OF FORCED ACCESS.

Among the factors that the Commission should consider in any discussion of less-costly alternatives pursuant to Section 603(c) is the impact that a forced-access alternative would have on the respective bargaining positions of building owners and operators vis-a-vis telecommunications carriers.[4] In terms of their relative size and economic muscle, even the smallest CLECs and other telecommunications carriers tend to outweigh the typical building owner or operator. Imposing obligations to deal on the latter thus stands the goal of the RFA on its head by tilting what may already be a playing field that favors the carriers even more dramatically in their favor.

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[4]In our comments on the NPRM itself, the Real Access Alliance demonstrates that the Commission lacks authority to regulate telecommunications access to privately held rental properties. To the extent that the Commission, nevertheless, in fact exercises such authority, it then has the obligation under the RFA to assess the economic impact of that exercise on the small entity owners and operators of such properties. Cf. Motor & Equip. Manuf. Assoc. v.

Increasing the bargaining position of the carriers might, nevertheless, be justified if in fact that were the only means of achieving the Commission's regulatory goal, but that is clearly not the case in this instance. In the first place, forced access would inhibit rather than promote competition. Indeed, such access would interfere with the efficient operation of the marketplace, thereby inhibiting innovation and limiting consumer choice. As only recently recognized by the Federal Trade Commission (FTC), the real estate rental business is highly competitive and characterized by low entry barriers into regional and local markets. See FTC, *Premerger Notification, Reporting and Waiting Period Requirements,* final rules effective April 29, 1996, 61 Fed. Reg.13666, 13674 (March 28, 1996)("HSR Final Rule"). The FTC, consequently, exempted that business from the pre-merger notification requirements of the Hart-Scott-Rodino Act. Id. Tenants, moreover, typically are very sophisticated when it comes to their telecommunications needs. With a wide range of alternatives available, owners and operators have little choice other than to be responsive to those needs. Tenant needs and preferences, moreover, can vary. Some might prefer state of the art technology "smart" buildings, others might prefer a more conventional building offering lower rents, and still others might find some other feature to be more important than either.

The extent to which building owners and operators choose to invest in telecommunications access is a decision that should be dictated by the give and take of natural market forces as opposed to the straightjacket of a forced access rule. Such a rule will inhibit choices available to building tenants and that is wholly inconsistent with the Commission's goal of increasing their options. The Commission's mandate to foster local telecommunications

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Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998), *citing* United Distrib. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

competition should not be viewed as a mandate to do so at the expense of other forms of competition. In its negotiations with a building owner or operator, a building tenant should have the freedom to place a greater value on factors other than telecommunications services if it deems those factors to be of greater importance to it.

In the second place, forced access is not needed to open local telecommunications markets up to competition. Available data demonstrates that CLECs and other carriers are getting access to rental buildings. See Strategic Policy Research, Inc., *Economic Issues Raised by the FCC's Proposed Policy of "Forced Access" for CLECs to Private Buildings,* at 5-6 ("SPRI Study"), attached to the comments of The Real Access Alliance as Exhibit D. On the basis of its analysis of data from eight CLECs, for example, Strategic Policy Research, Inc. found that on average the eight had gained access to over 229 buildings in each market in which they operate a local network. Id.

IV. THE PROPOSALS IN THE NPRM WILL HAVE A SIGNIFICANT EFFECT ON SMALL BUILDING OPERATORS.

Our comments on the merits of the Commission's proposals discuss at length the effects those proposals will have on the real estate industry if adopted. We are very concerned about the ability of commercial and residential building owners and managers to manage their properties effectively under these proposals.

We will not repeat our concerns in detail, but in sum, the proposals will interfere with the ability of landlords to insure compliance with safety codes; provide for the safety of tenants, residents, and visitors; coordinate among tenants and service providers; and manage limited physical space.

These concerns are particularly important in the context of small businesses, which have limited staffs and resources to fulfill those functions. If service providers are granted free access to our members' buildings, small building operators will find themselves unable to keep up with the service providers' activities. They could find themselves exposed to liability for everything from code violations to damage to tenants' property, and never know who was actually responsible for the damage. The additional expense of meeting such claims could threaten the financial viability of many small building owners.

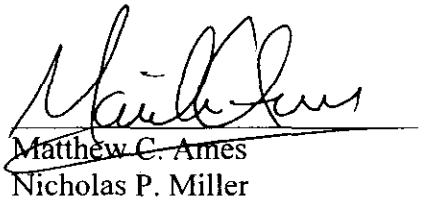
Consequently, should the Commission choose to ignore the requirements of the RFA, as discussed above, and proceed with the current NPRM, we urge the Commission to find specifically that any final rules will have a significant effect on a substantial number of small businesses and to exempt small businesses from the application of the rules. Although in our principal comments we note that many smaller buildings do not actively manage telecommunications providers on their premises, and further note that many providers are not interested in serving such buildings, many larger buildings that would be affected by the rules are still small businesses.

V. CONCLUSION

The Commission has failed, as required by Section 603 of the RFA, to describe and discuss possible alternative means of addressing its goal of promoting local competition for telecommunications services with less impact on small business entities and to solicit public comment on its analysis of that issue. It has thus, as a matter of law, given the public inadequate notice of its own analysis of this issue and the public has thereby been deprived of the statutorily required opportunity to comment on that analysis. To cure that breach of RFA's notice and comment requirements, the Commission should withdraw this NPRM and reissue it with a

revised IRFA. In doing so, the Commission should recognize that the forced access proposals would strengthen the advantage that telecommunications carriers typically already have in their dealings with building owners and operators, and be counterproductive in terms of their impact on consumer choice. It should further recognize that forced access is not needed in the long-run to promote local competition. At the very least, the Commission must exempt small businesses from any final rules.

Respectfully submitted,



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